

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FIRST STUDENT, INC.

and

Case 21-CA-39805

UNITED TRANSPORTATION
UNION, LOCAL 1496, AFL-CIO

Isael Hermosillo, Esq., for the General Counsel.
Theodore S. Scott, Esq. (Littler Mendolson, P.C.),
of San Diego, California, for the Respondent.
Erika A. Diehl, Esq., Assistant General Counsel,
for the Charging Party.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on January 10–12, 2012. The United Transportation Union, Local 1496, AFL–CIO (the Union) filed the original charge on May 13, 2011,¹ and the General Counsel issued the complaint on September 29. The complaint alleges that First Student, Inc. (First Student) violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union over the effects of its decision to terminate its operations at its Riverside, California location and by failing to provide the Union with requested information relevant to the Union’s performance as the collective-bargaining representative of the employees. First Student filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, labor organization status, supervisory and agency status, appropriate unit and 9(a) status. First Student denied it had violated the Act.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and First Student, and I make the following.

Findings of Fact

¹ All dates are in 2011 unless otherwise indicated.

² I grant First Student’s unopposed motion to correct transcript.

I. Jurisdiction

First Student, a Florida corporation with a principal office in Cincinnati, Ohio, is a nationwide provider of student transportation services, including a facility formerly located
 5 Riverside, California. During the 12-month period ending October 26, 2010, First Student derived gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$5000 at its Riverside facility directly from points located outside the State of California. First Student admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning
 10 of Section 2(5) of the Act.

II. Unfair Labor Practices

A. *Facts*

15 As indicated, First Student operated a facility located in Riverside, California. The Union represented a unit of bus drivers and aides³ pursuant to a certification of representative issued November 18, 2010.⁴ Prior to that certification Local 572, International Brotherhood of Teamsters represented the employees and had a contract with First Student covering those
 20 employees. After the certification the Union and First Student agreed to continue the terms of the Teamsters' contract.

Liz Sanchez is First Student's senior vice president. Larry Rodriguez is First Student's director of labor relations and chief negotiator. He covers about 50 facilities, about 40–45 of which are union organized, in the western United States; Rodriguez is an experienced labor
 25 negotiator. Fadi Chakbazof was First Student's regional operations manager. Among other things he oversaw the operations of the Riverside facility; he reports to Sanchez. Mike Robinson was the branch manager for First Student at the Riverside facility.

30 First Student biggest contract was through the Riverside County Office of Education (RCOE) that covered bus service for Alvord School District, the Val Verde School District, and the Jurupa School District; this contract was set to expire in the summer of 2011. In 2010 RCOE announced that it would no longer be the representative for those school districts. As a result, First Student had to bid for that work on an individual school district basis. First Student also
 35 had a contract with the Moreno Valley School District and other contracts.

During a meeting on March 28 First Student advised the Union of the developments concerning RCOE and of its efforts to bid individually on the contracts formerly covered by the

40 ³ That unit is:

All full-time and regular part-time bus drivers and aides employed by First Student at or out of its Riverside facility, excluding all other employees, office clerical employees, professional employers, dispatchers, mechanics, guards and supervisors as defined in the Act.

45 ⁴ Stated more precisely, the certification went to the United Transportation Union. The International then designated its Local, the Union, as its agent for representing the unit employees.

CBOE. In March First Student discovered that it was not lowest bidder for the Val Verde school route that it had run from its Riverside facility; this made it likely, but not certain, that First Student would lose that contract and that work. First Student attempted to salvage the contract but in mid-April First Student learned the work had been awarded to another company.

On April 10 Bonnie Morr, the Union's alternate vice president, sent a message to Fadi Chakbazof, First Student's regional operations manager indicating:

I have had some comments made to me in reference to the contracts that First Student Riverside has with different districts.

Please let me know what the reality is in the Riverside area. I am concerned that the information coming forward is incomplete. It is important that you keep the Union informed through this process. Please let me know as soon as possible what the contract situation is for Riverside First Student.

That same day or the next, Chakbazof called Morr and told her that First Student was not the low bidder for the Val Verde work and that First Student was still working on the bids for Jurupa and Alvord and that First Student had not yet decided on the effect this would have on the Riverside facility. Morr thanked him for calling and asked to be kept posted. These facts are based on Chakbazof's credible testimony. I have considered Morr's testimony that during the call Chakbazof informed her that nothing was happening at that time with First Student's facility in Riverside but that First Student was having problems with a bid it had concerning some routes but that it would be resubmitting the bid. To the extent that there is conflict in the testimony of Chakbazof and Morr, I credit Chakbazof. His testimony is more detailed and his demeanor was more convincing. Some of Morr's testimony was a blur of her subjective thoughts and feelings with what actually was said and occurred.

On about April 18 Chakbazof called Morr and told her that First Student was going to hold a meeting with employees because there were rumors flying around about the facility's closure and First Student wanted to address those rumors with the employees. He told Morr that it looked more and more likely that the Riverside facility would be closing, but it was not yet a certainty. I do not credit other portions of Chakbazof's testimony concerning this conversation. According to Chakbazof, he also told Morr that Liz Sanchez, First Student's senior vice president, would attend the meetings and that Sanchez would gather information and post questions and answers to address the concerns of the employees. Morr responded that she wanted to see the questions and answers 24 hours before they were posted. This, according to Chakbazof, explains the 24-hour requirement in the message described below. Chakbazof also told Morr that when they make a final decision about closing they will need to meet. This according to Chakbazof accounts for the mention in the message also described below about a meeting because Chakbazof then informed Sanchez that First Student would have to meet with the Union. However, in a statement of position submitted during the investigation of the charge in this case, First Student indicated that it was only *after* [emphasis added] it held the meetings with employees that Chakbazof called Morr and told her that as a result of questions that were asked during the meetings First Student intended to post the Q's and A's described below. Chakbazof's testimony in this regard seems to be conveniently created after the fact.

In any event, on April 19 Mike Robinson, branch manager for First Student at the Riverside facility, and Sanchez held meetings with the employees. They told the employees that

the facility would be closing because Val Verde was not renewing its contract with First Student. Sanchez then said that they would be offering to transfer the employees to other First Student facilities in the area and that they would not hire or train new employees at those facilities until the Riverside employees were transferred. Sanchez also explained that employees would be transferred in order of their seniority but once transferred the employees would drop to the bottom of the seniority lists at their new facilities and they would be paid whatever the pay rate was at those facilities and this meant that their pay rates would be cut. They explained that transfer lists would be posted for employees to indicate whether and where they wished to transfer. They also explained that the employees would no longer have a guaranteed 6 hours of work at the new facilities; the other facilities had only a 5-hour work guarantee. Felita Moore, an employee and also union president, explained that she was second on the seniority list so why could not First Student just merge the seniority lists so that she would not lose her seniority at the new facility. Robinson explained that to do so would not be fair to the employees already working at those facilities. Importantly, there is no allegation in the complaint that this meeting or its content was unlawful.

In the charge filed in this case the Union admitted that

On or about April 19, 2011, the Employer notified the Union of its plans to close the Riverside location and transfer the remaining work to other locations.

Thereafter Morr received calls from employees that First Student had held a meeting announcing that it had lost routes, that there would be layoffs, and that it would be posting sign-up sheets. Morr then called Larry Rodriguez, First Student's director of labor relations, and asked him what the sign-up sheets were for. Rodriguez explained that they were interest lists, not transfer lists, because First Student was not exactly sure what was going to happen at that time.

On April 27 Kim Mingo, director of human relations, sent Morr the following message:

As you are aware we recently announced the closure of our Riverside, CA location. Since that date we have received numerous questions from employees about the closure. We have compiled these questions and produced a Q and A that we intend to post at the location. I'm providing you with an advance copy of the Q and A along with the attachments. Unless I hear back from you within the next 24 hours about any concerns about the Q and A, it is our intention to . . . post this at the location. We are also working on our WARN notices and will have that to you shortly. I also know that Fadi (Chakbazof) will be meeting with you soon to discuss the lay off process. Please call me at the number below or on my cell . . . with any questions or concerns.

Attached to the message were a number of Q's and A's. They included information about unemployment compensation and the wage rates and insurance benefits offered at the location where some of the unit drivers might be transferred. Also included were the following:

Q. Will the transferring yard go by their pay scale and take the lower paid drivers over the higher paid drivers?

Employees who transfer to another location will be paid at the wage rates in place at that location.

Transfer to another location will be based on those employees who have signed up on the transfer list by the cutoff date and by seniority on transfer list.

Q. How will our seniority work if a group of us are transferred to the same branch, will we remain in the order as we are here?

Those employees who have signed up on the transfer list by the cutoff date and are selected for transfer to the same location will be transferred at the same time. Seniority will remain intact within that group, however these transferred employees will go to the bottom of the new location's seniority list. Employees who transfer after the posting is removed will be placed at the bottom on the new seniority list for that branch.

Q. Will there be severance pay for the drivers?
No severance pay will be provided for drivers.

Q. When will the transfer lists come down so drivers know to put their names on the list before its too late?

Transfer lists will be taken down at 5:00 p.m. on Friday, May 13, 2011.

First Student offered to transfer interested employees from its Riverside to other nearby facilities. Among those other facilities were Corona, where the employees are represented by Local 1227, Amalgamated Transit Union, AFL-CIO, and San Bernardino/Upland, where the employees are represented by Teamsters Union Local 572. Alvord and Victorville, other facilities where employees were offered transfers, were nonunion. Chakbazof explained that in California it takes at least 2 months and sometimes up to 3 months for new employees to undergo training and be licensed to operate a school bus. But First Student could avoid that process if its employees transferred from Riverside to other facilities that needed drivers. Regarding the severance pay issue, in response to my questions Chakbazof credibly explained that he understood that severance pay was an item to be negotiated with the Union and the Q's and A's were simply informing employees that First Student was not offering any severance pay; he expected the Union to raise that issue during the effects bargaining but, as will be seen below, the Union never did so.

On April 27 Morr responded to Mingo's message that same day, in pertinent part, as follows:

Kim,
I am reviewing the documents and I will get back to you.
We do have questions

...

3) Please clarify the actual number of routes . . . lost and the number of routes that have been part of First Student Riverside that is being distributed to other first student property [sic].

...

This is just a short list. I am expecting more questions from others, I will forward then [sic] to you as soon as I receive them.

Hopefully your twenty four hour time frame has been met, we will get additional concerns to you as soon as we can.

Still later that same day Morr sent Mingo the following message:

The Union is also requesting all copies of all posted documents and any hand outs that may have been given to any employees.

We will need all the dates that the contract changes happened.

I was told by the employees that the sign up sheets for transfers would be up until the end of June or the middle of July. Why did you change the dates? It is very difficult for people to make those types of decisions with such a short notice.

You do realize that what you are doing has an impact to working conditions, wages, and benefits, all items that by law must be negotiated.

Please get back to me within twenty four hours.

On April 28 Mingo sent Morr the message that follows:

I've taken the questions from both emails and combined them with our responses below:

- 1) One main issue of concern I have is the WARN notice please supply each and every employee with the notice as well as the Union

We intend to follow the requirements of the Federal and State law, which requires that for employees represented by a union, we provide the WARN notices to the union representatives. Mike Robinson will have copies of the generic WARN notices to give to those employees who request a copy for unemployment insurance purposes.

- 2) It would be beneficial to everyone if all wages were posted for each yard that is available.

FS does not intend to post wages at other locations, but Mike Robinson will inform those employees who ask him what the wages are.

- 3) Please clarify as to what actually will be happening with the yard/property at Riverside, it is my understanding that First Student will remain as the lease holder of the property.

FS has made no definite plans regarding the property.

- 4) Please clarify the actual number of routes and school contracts lost and the number of routes that have been part of First Student Riverside that is being distributed to other First Student property.

This information will be provided at your meeting with Fadi (Chakbazof).

- 5) What are the actual costs to employees, plus 1, family for the Medical Insurance at any of the other yards.

Premium costs for 2011-2012 have not been determined and are not available.

- 6) The Union is also requesting all copies of all posted documents and any hand outs that may have been to any employees

I'm assuming that you are referring to documents related to the location closure. No documents other than the transfer sign up sheets have been posted at the location pertaining to the location closure. We do intend to post the Q and A that I sent you.

- 7) We will need all the dates that the contract changes happen

Please clarify your request.

- 8) I was told by the employees that the sign up sheets for transfer would be up until the end of June or middle of July. Why did you change the dates? It is very difficult for people to make those types of changes with such a short notice.

It is our goal to transfer as many employees to other locations as possible. Hiring decisions at these locations need to be made on a timely basis. Delays could mean that the locations are forced to hire outside applicants. Employees who didn't sign up for transfer before the lists are removed may still apply at other locations for transfers, but they may not get the same preference as those who did sign up. Transfers to other locations will be done on a first come basis (those on the transfer sign up list) and based on seniority of those on the sign up lists.

- 9) You do realize that what you are doing has an impact to working conditions, wages, and benefits, all items that by law are to be negotiated.

As I indicated in my email to you, it is my understanding that you and Fadi will be meeting shortly to discuss issues associated with the lay off process.

Both this message and the earlier one refer to a meeting to be held between Morr and Chakbazof. Morr testified that when she received the messages no such meeting had been arranged. When I questioned Morr as to why she did not then contact Mingo and ask about the meeting with Chakbazof she replied:

Well, at this point, I knew that we were going to put in the request for bargaining. We hadn't heard from anyone. She was talking about – in this e-mail, about a meeting with the—with Fadi and we just forwarded the negotiations, because we hadn't heard from anyone. . . .

To me, this explanation is incomprehensible.

On April 29 the Union sent First Student a letter indicating that it is:

[R]equesting negotiations in respect to working conditions, wages, benefits and venues. In light of the recent changes that First Student has presented to the employees, and by law, any changes that the company is proposing that impacts working conditions, wages, benefits shall be negotiated.

Chakbazoff and Rodriguez testified that at some point in early May Chakbazof came into his office and they began discussing the situation at the Riverside facility concerning the loss of a major contract and the probability that the facility would have to be closed and employees be offered transfers to other First Student facilities in the area. They also discussed at what point the Union should be notified and they decided to Morr right then. So they went into Chakbazof's office, which is next to Rodriguez', and called Morr. Chakbazof explained the situation to Morr and the likelihood that the Riverside facility would close and the employees be offered transfers elsewhere. They discussed that sign-ups sheets would be posted so employees could indicate their preference as to which facility they wish to transfer. But I reject this testimony; it is clear that the decision to close the facility was made and announced weeks earlier and by early May the sign-up sheets had already been posted.

On May 3 Rodriguez sent Morr the following response to the April 29 letter:

I received a copy of your request to meet over the impact on terms and conditions of the CBA. Do you have dates open in the (sic) June my and Fadi's calendars are closed in May. The only dates I have committed now (sic) to other assignments are June 8, 9, 10.

Chakbazof and Rodriguez then participated in a conference call with Morr to set up dates for effects bargaining. During that call Chakbazof informed Morr concerning the loss of the Alvord work, again informed her of the loss of the Val Verde work, and informed her that Jurupa work had been awarded to First Student. Chakbazof explained to Morr that the transfer sheets were not guarantees that employees would be transferred and he told Morr that he anticipated about 30–35 positions being available at the Alvord facility, about 25 at San Bernardino, and the regular turnover at Upland and Corona. Then Morr and Rodriguez began to discuss dates for the bargaining. Morr asked why they could not meet earlier and Rodriguez explained that his schedule was already arranged for the first 2 weeks in May and that after that he was going to New York for several days for his daughter's graduation from law school. Rodriguez also explained that the Chakbazofs were expecting a baby in mid-May and Chakbazof had scheduled to take some time off then. And in late May Rodriguez was scheduled for negotiations with other labor organizations. Morr and Rodriguez eventually agreed to move up the meetings to June 1 and 2.

First Student sent the Union a "WARN" notice dated May 3. Among other things, the notice indicated:

The layoffs resulting from this closing are expected to be permanent, and the entire facility is expected to be closed.

As you may be aware, the Riverside County Office of Education decided not to award First Student any routes for the 2011–2012 school year. As a result of these sudden, unforeseen business circumstances First Student expects its Riverside, California facility . . . to experience a permanent closing. While the exact date for the closing has not been established, it is anticipated to occur on approximately July 31, 2011.

As many as 135 employees may be subjected to a layoff. Employees in the driver and aide classifications at the Riverside, CA location are represented by [the Union]. . . A list of these employees is enclosed. However, First Student may have transfer opportunities available for some employees at other facilities. In the very near future, First Student

will provide a procedure for employees to express their interest in any of these transfer opportunities.

Of course, the evidence shows that the transfer sheets had already been posted by that time.

On May 10 the Union sent First Student the following message:

Fadi (Chakbazof) and Larry (Rodriguez),

I have been waiting to hear from you in reference to the sign up sheets and the date you are planning to take them down.

In our last conversation you had stated that these sign-up sheets were interest sheets for drivers if they were interested in some type of transfer. I have had multiple conversations with the workers there at Riverside and they are telling me that these are transfer sheets. They are suppose [sic] to sign if they want to transfer. This is what they are being told by First Group.

I saw photos of the sheets posted and none say interest sheets.

Besides the fact that this process is being imposed on these workers and no negotiations were requested by First Group prior to this process being implemented, we are again requesting that a clarification be given to the workers and the Union as to the intent of the sign up sheet. Also that the time frame be extended.

On May 12 First Student responded:

You recently inquired about the interest sign up sheets at the Riverside location.

Originally these were scheduled to be taken down on May 13. In order to give our employees additional time to let us know of their interest in positions at other locations, the sign up sheets will remain up at the Riverside location until May 31.

Not satisfied, the Union replied, "It would be beneficial if the notice was up until after we have our meetings, which are set for June 1 and 2." First Student then agreed to this request also. On May 13 First Student informed the Union that the transfer sheets had been taken and were missing. On May 31 the Union requested a number of other items of information; it also reiterated its request for all material First Student posted concerning the closing of the facility.

On May 26 the Union sent First Student a message asking if it had an agenda for the upcoming meetings on June 1 and 2. First Student replied that it did not have an agenda yet but "it would help if you sent me (the) topics you want to cover which would allow us time to research in advance." The Union did not provide that information. On May 31 the Union requested a number of other items of information; it also reiterated its request for all material First Student posted concerning the closing of the facility.

First Student and the Union then met on June 1 and 2. Morr was accompanied by three employees, Felita Moore, who was also union president, Roman Lara, and Christopher Hubbell; who was also union acting chair and secretary/treasurer. Chakbazof was joined by Rodriguez and Robinson. The meeting began with Rodriguez providing the Union with benefit summaries, premium cost sheets, and wage rates for the facilities that would be accepting transfers from the Riverside facility. Morr asked about the daily work guarantees at those facilities and Chakbazof explained that those facilities had a 5-hour daily work guarantee, unlike Riverside that had a 6-

hour guarantee. Morr requested a copy of the employee handbook and the latest seniority list and First Student agreed to and later did provide that information. Morr asked for the number of routes per location and Chakbazof explained that it was a moving target because school districts may be reducing the number of routes but he gave his estimates for the number of routes that would be available at each location. Chakbazof explained that, for example, routes were being transferred to Alvord that previously had been serviced by employees at the Riverside facility, but a precise number was impossible to give at that point because Alvord School District was looking to reduce the number already being serviced by First Student's employees at the Alvord location by 10-12. He explained that if this occurred those displaced employees would be bidding on the routes being transferred there from the Riverside facility. Chakbazof announced that there may be several openings at another, more distant, facility if any employees were interested in transferring there. Morr responded by saying, "okay, how many of the employees will have jobs?" Chakbazof explained that he could not give a number because it was also dependent on number of employees at those locations who decided not to return there at the start of the school year. Morr asked for a copy of the list of employees who had signed the posting indicating an interest in transferring to "other" locations, and First Student agreed to provide that. Morr asked how First Student intended to use seniority and years of service. Rodriguez explained that First Student would use the years of service to set the pay rate for employees transferring to the other facilities but that seniority would not be recognized for bidding purposes just as First Student would do if a number of employees had been transferred to the Riverside facility. Rather, bid rights seniority begin on the date the employee starts at their new location. Morr asked for an explanation of the transfer process and how they could insure that employees are not later denied the opportunity to transfer. Chakbazof explained the transfer process, including how after the transfer lists were taken down First Student would rearrange the names on the lists according to their seniority at the Riverside facility and these lists would then be provided to the managers at the receiving facilities who would call employees in order of seniority as positions became available. But the managers would begin to use these lists only after the receiving facilities had completed their own seniority bidding process. Morr stated that the Union felt that First Student should have talked to the Union before it took any steps and notify the Union what it was doing regarding the transfers but First Student did not do so. Chakbazof protested that he and Rodriguez called Morr in May to tell her of the closing and informed her that First Student would be making transfers available to interested employees. He explained that the transfer sheets had to be posted quickly in order to get a quick start on staffing needs and training; those facilities needed to know how many Riverside employees were interested in transferring so they could adjust their new hires accordingly. The parties discussed unemployment insurance for employees who did not desire to transfer and those who were offered a transfer but did not show up. The Union raised the issue of holiday pay for Memorial Day and First Student agreed to pay holiday pay for Memorial Day. First Student also gave the Union copies of the sign-up sheets that had been posted. Morr asked if there was any interest in dovetailing union seniority at the other locations; Rodriguez answered that First Student would follow the same practice it had been following with other similar transfer situations. Rodriguez said that most unions do not agree to dovetail seniority because it affects their union members. Morr asked that the time for employees to sign the transfer sheets be extended and after a caucus First Student agreed to do so for an additional 5 days. Morr asked if there was any interest in allowing the employees return to the Riverside facility if the Riverside facility reopens within 5 years. Chakbazof and Rodriguez said that the current status is that First Student saw no near term or long-term opportunity to reopen the Riverside facility under the current conditions of its business in the area and that it could not determine what would happen years down the road.

First Student indicated that only two summer routes were currently being run and the facility would close on July 22. Rodriguez and Chakbazof explained that it would be impossible to tell which employee transferred to what facility until the employees actually accepted the transfer and reported for work because employees might have signed the transfers lists and but then found a better job or otherwise changed their mind and did not report to the other locations. In addition, the number of employees transferred to the other locations would depend in part on turnover at those locations among employees who had worked there the previous school year. As the meetings were winding down Rodriguez asked Morr if there was anything else that they needed to cover and Morr replied that she thought they had covered everything. Then Rodriguez asked if the Union was now willing to withdraw the charge and Morr refused indicating that it was in the hands of the Union's legal staff. The Union made no written proposals at the meetings.

The foregoing facts are based on the credible testimony of Chakbazof and Rodriguez. I have considered Morr's testimony; much of it is in line with that of Chakbazof and Rodriguez. Morr admitted that during the meetings First Student provided the Union with copies of the transfer lists that had been posted and signed by employees and that First Student informed the Union that First Student had lost the Val Verde contract and that the Riverside facility would be closing around July 22, near the end of summer school. First Student informed the Union that 30 or 40 routes were lost and that remaining 60 routes would be distributed to other facilities listed on the transfer sheets. The Union asked what the wage scales would be at the facilities where the employees were transferred and First Student provided some of that information. The Union asked how many positions would be available to unit employees at the other facilities and First Student, according to Morr, "had some information on the properties that were available." The Union raised the subject of seniority, pointing out that some of the unit employees had many years of seniority at the Riverside facility; the Union asked if First Student would dovetail that seniority with the seniority of employees at the remaining facilities. The Union asked that the employees be paid holiday pay for Memorial Day and First Student agreed to do so. The Union asked that the transfer lists remain posted until June 10; after first rejecting that proposal First Student agreed to allow the transfer lists to be posted again until June 8. Morr testified that during the meetings "I believe we asked for what the work was gonna be that was gonna be distributed to the other facilities." According to Morr, First Student replied:

I think they had some approximate numbers that, you know, would be going, because it—was linked to the positions that would be available and open for—you know, for employees to be able to work and be transferred.

But at the hearing Morr complained that First Student did not inform the Union concerning which Riverside routes were going to which other First Student facility. To the extent that Morr's testimony is inconsistent with that of Chakbazof and Rodriguez, I do not credit it. Again, based on my observation of the demeanor of the witnesses and assessed against the record as a whole, I conclude that the testimony of Chakbazof and Rodriguez is the more accurate accounting of these meetings.

On June 28 the Union sent First Student the following message:

I was hoping that you would get back to me in reference to what is happening with the Drivers at Riverside. At our last meeting you were supposed to send me information on

the process you are using to determine the placement of the Drivers. Also you were supposed to keep the Union informed as to the disposition of all 135 drivers and aides. To date I have not heard from you or anyone else in reference to the situation that is going on at the Riverside property.

There is an obligation to negotiate with the Union, so far you have not contacted the Union with previously requested information or update.

I pause to explain why I do not credit Morr's assertions in these messages that she asked to be updated concerning certain matters. First and most importantly, Morr did not testify that during the June 1 and 2 meetings that she asked First Student "to *keep* [emphasis added] the Union informed as to the disposition of all 135 drivers and aides." And to the extent that such a request can inferred from Morr's testimony I do not credit it. I note that in that very same message Morr asserted, "At our last meeting you were supposed to send me information on the process you are using to determine the placement of the Drivers." But facts show that at the June meetings and prior thereto First Student did explain the transfer process to Morr. Again, it appears Morr was confused. In any event, Rodriguez replied 2 days later as follows:

I have reviewed my notes from the meetings in June. I do not have notations regarding the providing of more or periodic information on the placement process to be followed at Riverside. All I have is that we ended the meeting speaking in general terms about the anticipated closing date of July 22 and start up dates at other locations that could be varying dates in the first week of August. At the meeting June 1 you did ask what the process to be used was or how do we guarantee everyone who signed up gets considered. [Chakbazof] indicated we do not use formal written procedures. However, [Chakbazof] and Mike Robinson responded in detail as to how the sign up sheets were being handled and sorted by employee preferences and seniority, and then the lists are given to other branch managers and how those branch managers in turn call the employees to setup further processing and orientation into their branches. We indicated this "process" has been a proven straight forward and successful process used many times over the years. To my knowledge it is now or soon will be utilized as the Riverside branch phase down begins. I have not heard of any issues or concerns with this transfer process, certainly if there is anything specific developing that you know about, [Chakbazof] and the HR manager should be notified asap so they or I can address them with you as appropriate. Also, it was always my intention, if there are any significant revisions to the closure status as it affects [the Union] employees, to . . . keep you informed as I got the information. To date I have not been advised that anything has changed to the closure plans.

The Union replied:

I disagree with you I did request the procedures at the meeting and I asked for the documents being used. I also requested the list of all people being transferred, to what locations and in what order. I have that only notes. [sic] Even if there was a discussion at the table that does not substantiate how or what First Student is doing. All that being said please send all documentation as to who, where, when and in what order our . . . members are being transferred. Also please include what the new salaries will be for each person as well as medical benefits.

First Student responded on July 1:

I checked with Fadi [Chakbazof] and Mike [Robinson] and they are proceeding just as we discussed in June. The branch managers with openings will be calling the employees who signed up for transfers by their seniority order. The relevant documents have been given to the Union at our June meetings i.e., branch pay rates and benefits tables, transfers lists and the employee policy handbook as you requested. We cannot determine who has transferred until the employee actually reports for work the first day. As we discussed in June, employees can at anytime change their minds before school starts or some do not report as scheduled or other issues may affect employment (lapse in lic's, certs). Please encourage all your current represented employees to keep in touch with the branch manager or their designee at the locations they selected after they are contacted for transfers. They should bring up all employment/transfer questions to the branch manager who will confer with HR as needed since the employee will no longer be represented by the [Union] at the new locations under consideration here.

In other words, Morr kept asking for the names of the employees who were being transferred to specific locations despite the fact that First Student had repeatedly explained why it could not provide that information at that time. Attached to the message sent by First Student were copies of the transfer lists. I again comment on Morr's credibility. Morr also initially testified that First Student did not send her copies of the transfer lists as an attachment to its July 1 email message. But during a break she checked her emails and discovered that indeed the transfer lists had been provided to her but she never opened the attachment. This lack of care in reviewing messages sent to Morr by First Student opens up a concern about what else had been provided to her but not read.

Finally, on October 4 the Union's attorney sent First Student a letter that requested the four items of information listed in the complaint in this case. On November 4 First Student's attorney responded, in pertinent part:

1. Copies of the interest lists are enclosed herewith.
2. July 31, 2011.
3. 38 routes and 8 trip buses were lost due to the loss of the Riverside contract. Alvord required its 24 routes to be transferred to the District's own facility. 19 routes (Morena Valley) were transferred to the Company's San Bernardino location. 11 routes (Jurupa Unified) were also transferred to the Alvord USD facility.
4. A list showing the employees who transferred to other facilities is enclosed herewith.

The latter item listed the employee and the First Student facility to which the employee transferred.

First Student did transfer all Riverside unit employees who expressed an interest in transferring and who showed up for work at their new location. However, because First Student extended the posting periods at the Union's request it began the school year short a handful of drivers because it was unable to complete the training period for new employees in time. It therefore had to use drivers from other locations, thereby incurring additional costs.

B. Analysis

I turn first to the allegations in the complaint concerning the refusal to provide information. An employer must provide a union with requested information that is relevant to union's performance of its duties as a collective-bargaining representative of employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Preliminarily, I note that the Union requested much information in addition to the information described below and First Student provided that information. Of course, this does not relieve First Student of its obligations to provide other information, but it does show that First Student made efforts to give the Union the information the Union wanted.

The complaint first alleges that:

Since on or about April 19, 2011, and including, but not limited to, April 27, 2011, June 1-2, 2011, June 7, 2011, June 28, 2011 and July 11, 2011

the Union requested "copies of all documents that were posted at the Riverside facility that concern the termination of operations there, and its effects on the Union" and that since on or about April 28 First Student "failed and refused" to furnish the Union with that information. I have concluded above and indeed Morr admits that at the meetings on June 1 and 2 First Student did provide the Union with the copies of the transfer lists. First Student had also given the Union copies of the Q's and A's that it posted. There is no evidence of anything else that was posted but that was not given to the Union. In his brief the General Counsel argues that First Student unlawfully delayed providing this information. But it is now too late for that argument; due process bars such a finding. *Piggly Wiggly Midwest*, 357 NLRB No. 191, slip op. at 2 (2012). The matter was not alleged in the complaint nor did the General Counsel move to amend the complaint despite knowing full well that the transfer lists had been given to the Union. Even in his brief the General Counsel does not bother to argue how he has satisfied his due process obligations. It is, after all, a simple matter to draft a complaint that alleges an unlawful delay in providing information. But here the General Counsel chose to do otherwise with the apparent expectation that First Student should be able to discern the violation to be litigated from the evidence it presents at hearing. Moreover, the due process concerns on this issue are not merely theoretical. There is some evidence that the transfer lists were removed and not available for a period of time. Had the issue of unlawful delay been properly plead this matter could have been more fully developed as to what caused the removal, how long the removal lasted.

Next, the complaint alleges that:

Since on or about April 19, 2011, and including, but not limited to, April 27, 2011, June 1-2, 2011, June 7, 2011, June 28, 2011 and July 11, 2011

the Union requested the "dates of changes to transportation contracts serviced by or from the Riverside facility that resulted in Respondent's decision to terminate operations there" and that since April 28, 2011, First Student "failed and refused" to provide the Union with that information. In its message of April 27 the Union indicated, "We will need all the dates that the contract changes happened." This allegation fails for a number of reasons. First, what happened was that First Student's customers decided not to renew contracts; there were no changes to contracts that lead to the shutdown of the Riverside facility. Next, any dates concerning those contracts are not directly relevant to the Union's representational duties; they do not represent

the wages, hours, or working conditions of the represented employees or something that could assist the Union in effects bargaining. Absent a showing of relevance, First Student is not required to provide that information. Also, the very nature of this allegation in the complaint ties the relevance of this information to the reasons for the closing yet the General Counsel concedes that First Student was not obligated to bargain over its decision to close the Riverside facility. Importantly, remember that First Student asked the Union to please clarify this request and the never did so. Finally, in his brief the General Counsel admits, “The Respondent provided the information on June 1, 2011[.]” I dismiss this allegation in the complaint.

Continuing, the complaint alleges that:

Since on or about April 19, 2011, and including, but not limited to, April 27, 2011, June 1-2, 2011, June 7, 2011, June 28, 2011 and July 11, 2011

the Union requested “the number of routes lost that were serviced by the unit and that were/are being distributed to Respondent’s other facilities” and that since April 28, 2011, First Student “failed and refused” to provide the Union with that information. In its message of April 27 the Union stated, “Please clarify . . . the number of routes that have been part of First Student Riverside that is being distributed to other first student property [sic].” Again in his brief the General Counsel admits, “The Respondent provided the information on June 1, 2011[.]” Moreover, First Student explained to the Union that the number of routes transferred did not mean that those routes were available for unit employees. Rather, it explained that employees at those other facilities would be able to bid on the newly acquired routes and that the number of openings would likely exceed the number of routes transferred because First Student was offering transfers that resulted from turnover as well. And in early May First Student did inform the Union of the approximate number of openings available at the other facilities for unit employees. Under these circumstances the actual number of routes transferred would have been of marginal use to the Union in assisting it in effects bargaining; remember that all employees who desired to transfer were in fact transferred. I dismiss this allegation of the complaint.

Lastly, the complaint alleges that

Since on or about April 19, 2011, and including, but not limited to, April 27, 2011, June 1-2, 2011, June 7, 2011, June 28, 2011 and July 11, 2011

the Union requested First Student to provide it with “the names of Unit employees being transferred to Respondent’s other facilities and locations to which they are being transferred” and that since April 28, 2011, First Student “failed and refused” to provide the Union with that information.⁵ But each time the Union requested that information First Student took pains to explain to the Union how it could not supply that information at the time it was requested. This was because until First Student actually knew the amount of turnover at the other facilities it would not know the number of openings available to offer the unit employees; First Student would not know this information until employees reported for work at the start of the school

⁵ By now the reader has noticed the smorgasbord nature of the dates. alleged in the complaint, serving a wide variety of choices that First Student must be prepared for but allowing the General Counsel to pick and choose only those that remain appealing after the trial.

year. And even then, as it explained, First Student would not know the names of the unit employees transferred until those employees accepted the transfer and actually showed up for work. Finally, First Student did give this information to the Union after the start of the school year. I dismiss this allegation also.

Unconcerned about basic due process, the General Counsel in his brief urges additional unlawful refusals to provide information that are *not* [emphasis added] alleged in the complaint. The General Counsel may certainly explain to the Board on exception how First Student should have known it was expected to present a defense to those matters.

In summary, I conclude that the General Counsel has failed to prove the allegations concerning the failure and refusal of First Student to provide information. I also independently conclude that the circumstances surrounding these allegations did not have a significant impact on the Union’s ability to effectively engage in effects bargaining, certainly not to the extent would have tainted that bargaining and triggered an automatic *Transmarine* remedy. See *Piggly Wiggly*, *supra*.

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682, (1981), the Supreme Court indicated that a union must be allowed a “significant opportunity” to bargain about the effects on bargaining unit employees of a closure and that such bargaining must be conducted in a meaningful manner at a meaningful time. . . .” I now address the allegation in the complaint that “Since on or about April 10, 2001, the Union requested that Respondent bargain collectively about the effects, on the Unit, of Respondent’s decision to terminate operations at its Riverside facility” and that since that date First Student “has failed and refused to bargain collectively about of the effects, on the unit “of its decision to close the Riverside facility. As described above First Student gave the Union ample notice of its intent to close the facility; the Union then requested bargaining and First Student agreed to do so. The parties met for 2 consecutive days and discussed all issues raised by the Union. So this allegation in the complaint is plainly and simply unsupported by the evidence; there was neither a failure nor a refusal to bargain.

In his brief the General Counsel points to the meetings that First Student held with employees on April 19 during which it announced the closing and explained its intent to offer employees transfer to other facilities and how the transfer process would work. But remember there is no allegation in the complaint that these meetings were in any way unlawful. Remember also that First Student advised the Union of its intent to hold the meetings and provided the Union with the general nature of the meetings. Had this matter been alleged in the complaint, among other things, I would have considered what the contract had to say concerning transfers and what the past practice between the Union and First Student was concerning these matters. I therefore decline to conclude that anything unlawful occurred at these meetings.⁶ The General Counsel also points to the posting of the Q’s and A’s. In fact the Q’s and A’s addressed the

⁶ In his brief the General Counsel correctly points out that First Student “provided no witnesses relating to the April 19, 2011, in-service meetings.” This is not surprising given that First Student was not put on notice that its conduct relating to the meetings was unlawful.

working conditions of the unit employees, particularly the transfer process and severance pay.⁷ But here again the complaint does not allege that First Student unlawfully implemented those matters. Indeed, there is some evidence that the transfer process used by First Student was an existing term and condition of employment and therefore might have subjected First Student to unfair labor practice charges had it not continued to follow that practice. Moreover, an employer is first required only to give notice to a union before it implements terms and conditions of employment and then, upon request, first bargain about those matters before implementation. Here First Student did give the Union notice, albeit only 24 hours, before it posted the Q's and A's. All the Union had to do was simply state that it objected to the posting within that period; it did not do so. Again, the Union did not react by asking First Student not to post the Q's and A's, nor did the Union request to bargain first about transfers or severance pay. Instead the Union made only vague assertions that First Student should be bargaining. Concerning the transfer process in particular, First Student had a legitimate need to act quickly so it could be prepared with an adequately trained and licensed work force. When the Union asked to extend the posting period for the transfers, First Student twice agreed to so. Perhaps most important is the fact that the Union never clearly objected to the fact that First Student was transferring unit employees rather than laying them off nor did it ever request that First Student stop the transfer process until the Union first bargained concerning the process to be used for the transfers. And I have concluded that the Union never raised the matter of severance pay at all nor did it credibly explain its failure to do so. In other words, the Union never tested Chakbazof's credible testimony that First Student expected to bargain about that matter.

Finally, there is no allegation in the complaint that First Student engaged in mere "surface bargaining" at those meetings. Nor would the evidence support such a finding even if it had been pleaded in the complaint. This is so because First Student considered all proposals made the Union and gave coherent explanations as to why it did not agree to the proposals. In his brief the General Counsel points to the period of time that elapsed between the requests to bargain and the actual bargaining. But I note that First Student responded quickly to those requests by reaching out to the Union to set dates for bargaining. And the delay was caused in part by previously scheduled matters of equal importance and entirely understandable personal matters such as the anticipated birth of a child and the out of state graduation of a child from law school. Finally, First Student did agree to move forward the dates for bargaining by about

⁷ Although not cited by the General Counsel, I have considered the Board recent decision in *Dodge of Naperville*, 357 NLRB No. 183 (2012), in assessing whether the Q's and A's dealt with other issues that could be the subject of effects bargaining such as the wages and other working conditions of the transferred employees at their new facilities. I am, of course, required to follow existing Board law and I have attempted to do so in this case. But it seems to me that it is well settled that, in the absence of a question concerning representation, the transferred employees would be represented by the incumbent unions there and their working conditions would be governed by existing collective-bargaining agreements and past practices at those facilities. In other words, to require or even allow First Student to bargain with the Union about those matters would undercut the settled notion that the unions at those facilities are the *exclusive* collective-bargaining representatives for the unit employees, including the recent transferees. The best I can do in assessing the impact of the *Dodge of Naperville* case is to conclude that it is a "sport" case that must be limited to its particular facts, at least until such time as the Board explains in more detail the impact of that case on existing, well-settled law.

1 week. This is all quite apart from the fact that the complaint does not allege that First Student unlawfully delayed bargaining with the Union.

For all these reasons I dismiss that allegation that First Student has “failed and refused” to bargain concerning the effects of the closure of its Riverside facility on unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁸

ORDER

The complaint is dismissed.

Dated, Washington, D.C., April 11, 2012.

William G. Kocol
Administrative Law Judge

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.